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Nos. 10-238 and 10-239

IN THE

Supreme Court of the United States

ARIZONA FREE ENTERPRISE CLUB'S FREEDOM CLUB PAC, *ET AL.*,

Petitioners,

—v.—

KEN BENNETT, *ET AL.*,

Respondents.

JOHN MCCOMISH, ET AL.,

Petitioners,

—v.—

KEN BENNETT, *ET AL.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF FORMER OFFICIALS OF THE AMERICAN CIVIL LIBERTIES UNION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether Arizona's decision to provide candidates who voluntarily agree to forego private campaign contributions with an initial campaign subsidy, supplemented by additional funds up to a fixed amount keyed to the campaign spending of a privately-funded opponent, imposes an unconstitutional burden on the campaign speech of privately-funded candidates?

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Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

INTEREST OF *AMICI CURIAE* AND STATEMENT OF POSITION [1]

Amici have devoted much of their professional lives to the protection of the First Amendment and the advancement of the democratic process. Norman Dorsen is the Frederick I. and Grace A. Stokes

[1] This brief is filed pursuant to blanket consents filed with the Clerk of the Court by all parties. No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *amici*, make a monetary contribution to the preparation or submission of this brief.

Professor of Law and co-director of the Arthur Garfield Hays Civil Liberties Program at New York University Law School. He served as General Counsel of the American Civil Liberties Union (ACLU) from 1969-1976, and as President of the ACLU from 1976-1991. Aryeh Neier is President of the Open Society Foundations. He served as ACLU Executive Director from 1970-1978, and as Executive Director of Human Rights Watch from 1978-1990. Burt Neuborne is the Inez Milholland Professor of Civil Liberties at New York University Law School. He served as ACLU Legal Director from 1981-86, and as a member of the New York City Human Rights Commission from 1988-92.[2] John Shattuck is the President and Rector of Central European University in Budapest. He served as ACLU Legislative Director from 1976-1984, as Assistant Secretary of State for Democracy, Human Rights and Labor from 1993-98, and as Ambassador to the Czech Republic from 1998-2000. Morton H. Halperin is Senior Advisor to the Open Society Institute. He served as ACLU Legislative Director from 1984-1992, and as Director of Policy Planning at the State Department under President Clinton.

Amici respectfully submit this brief in support of the facial constitutionality of Arizona's matching fund program. *Amici* believe that public funding of

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[2] Burt Neuborne, one of the co-authors of this brief, enjoys an honorific title as founding Legal Director of the Brennan Center for Justice at NYU. Several lawyers associated with the Brennan Center appear as co-counsel for respondents in this Court. Mr. Neuborne exercised no supervisory authority in connection with this litigation, and is not counsel for a party in this proceeding.

electoral campaigns can play a significant role in improving the democratic process, and that matching funds provides an efficient, effective and equitable method of encouraging candidates to participate in public funding programs, while respecting the right of non-participating candidates to raise and spend unlimited sums seeking election.

STATEMENT OF THE CASE

In 1998, Arizona voters, reacting to an unfortunate series of political scandals, directly enacted a voluntary publicly-financed campaign program by voter initiative. Under the Arizona program, participating candidates receive an initial campaign subsidy, must agree to forego private contributions, and are obliged to respect an expenditure ceiling. Non-participating candidates are constitutionally free to raise and spend unlimited sums.

In seeking to establish a comprehensive and efficient voluntary public funding system at reasonable cost, Arizona confronted a well-recognized practical dilemma. In the years after this Court's foundational decision in *Buckley v. Valeo*, 424 U.S. 1 (1976), candidates opposed by a privately-funded opponent often reluctantly declined to participate in public financing programs because they feared a severe campaign spending mismatch. In order to encourage broad candidate participation (and thereby obtain the multiple benefits associated with public financing recognized in *Buckley*, 424 U.S. at 92-96), Arizona elected to offer participating candidates an initial campaign subsidy,

supplemented by additional funds keyed to the campaign spending of a privately-financed opponent, up to three times the initial subsidy. Such a matching fund concept minimizes the prospect of severe public/private campaign spending mismatches, while efficiently deploying scarce public funds. Privately-funded candidates remain free to raise and spend unlimited and unmatched sums above the supplemental grant ceiling.

In its 13 year history, Arizona's matching fund program has been an unqualified success. It has bolstered widespread candidate participation in public funding without squandering scarce public resources, encouraged ordinary citizens to run for office, enhanced the flow of information to the electorate, relieved candidates and elected officials from the distraction of private fund-raising, and, most importantly, has restored public confidence in the democratic process by effectively combating the reality or appearance of electoral corruption.

SUMMARY OF ARGUMENT

The concept of matching funds is facially constitutional because it encourages widespread candidate participation in public funding, which, in turn, advances at least four important governmental interests: (1) combating corruption; (2) freeing elected officials and candidates to concentrate on public business; (3) stimulating ordinary citizens to run for office; and (4) enhancing the flow of useful information to the electorate. Moreover, it does so without imposing a significant or coercive burden on the speech of privately-funded candidates. Indeed,

the only incidental burden experienced by privately-funded candidates is the prospect of being rebutted in the marketplace of ideas.

Where, as here, Arizona seeks to advance its vital interests, not by coercively silencing a disfavored speaker, but by increasing the quantity of useful information available to hearers, this Court has wisely refrained from deploying the heavy artillery of First Amendment strict scrutiny. Rather, the Court requires a showing that Arizona's matching fund program: (1) advances a genuinely important government interest; (2) is unrelated to the suppression of ideas; (3) is even-handedly administered; and (4) is plausibly linked to the advancement of the government's interest.

Arizona's matching fund program clearly satisfies such scrutiny.

ARGUMENT

I

ARIZONA'S MATCHING FUND PROGRAM IS A FACIALLY CONSTITUTIONAL MEANS OF ENCOURAGING PARTICIPATION IN ITS PUBLIC CAMPAIGN FUNDING PROGRAM

A. The Relevant Legal Background

In *Buckley v. Valeo*, 424 U.S. 1 (1976), this Court, applying First Amendment strict scrutiny, struck down Congressional efforts to impose ceilings on the campaign spending of privately-funded candidates

and their supporters (424 U.S. at 39-59), but rejected a First Amendment challenge to contribution ceilings, ruling that reasonable contribution ceilings advance a "compelling" governmental interest in combating the risk or appearance of electoral corruption (*Id* at 23-38). The *Buckley* Court then upheld stringent campaign disclosure and record-keeping provisions designed to combat corruption and to provide the electorate with useful information, despite the incidental burden imposed by mandatory disclosure on the First Amendment right to anonymous speech recognized in *Talley v. California*, 362 U.S. 60 (1960), and reaffirmed in *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334 (1995). (*Id* at 60-84).

Finally, despite the differential treatment of major and minor party candidates (*Id* at 290-94)(Rehnquist, J., dissenting in part)), the *Buckley* Court upheld the constitutionality of a voluntary public financing plan that concentrated scarce public funds on viable candidates as a permissible means of: (1) combating corruption (424 U.S. at 96); (2) freeing candidates and elected officials from being forced to expend disproportionate time and energy in seeking to raise private funds (*Id* at 96);[3] (3) encouraging ordinary citizens to run for office (*Id* at 92-93); and (4) enhancing the flow of useful information to the electorate (*Id* at 92-93, and n. 127). *Id* at 97-99.

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[3] See Vincent Blasi, *Free Speech and the Widening Gyre of Fundraising*, 94 Colum. L. Rev. 1281 (1995).

In upholding the Presidential public funding program despite the First and Fifth Amendment issues raised by differential treatment of major and minor candidates, the *Buckley* Court asked whether "Congress [had] enacted [the public funding program] in furtherance of sufficiently important governmental interests and ha[d] not unfairly or unnecessarily burdened the political opportunity of any candidate." 424 U.S. at 95-96. The *Buckley* Court traced that standard of review to Fifth and Fourteenth Amendment cases such as *American Party of Texas v. White*, 415 U.S. 767, 780-81 (1974), holding that restrictions on participation in the electoral process must advance important governmental interests without imposing undue burdens on candidates and voters. 424 U.S. at 95-96. Seven years later, in *Anderson v. Celebrezze*, 460 U.S. 780 (1983), the Court recognized that cases like *American Party of Texas* should be measured by a First Amendment standard that is virtually identical to the Fifth Amendment standard applied in *Buckley* to uphold the Presidential public financing system.

In the end, therefore, all legal roads lead in this case to a First Amendment standard of review that asks whether the government interests advanced by Arizona's matching fund program are substantial, and whether "the political opportunity of any candidate" is "unfairly" or "unnecessarily" burdened. Indeed, no functional difference exists between the First and Fifth Amendment standards applied in *Buckley* to uphold disclosure and public financing, and the First Amendment standard of review utilized by this Court in speech-enhancing cases like *Turner Broadcasting System v. FEC*, 512 U.S. 622

(1994) (*Turner* I), *Turner Broadcasting System v. FEC*, 520 U.S. 180 (1997) (*Turner* II) (upholding FCC "must carry" rules), and *Citizens United v. FEC*, 558 U.S. ___ , 130 S.Ct. 876 (2010) (upholding disclosure provisions). In each setting, the Court examines the importance of the governmental interests advanced by the program, and assures that the incidental burdens, if any, placed on free speech are not unduly substantial.

B. Arizona's Matching Fund Program Enhances the Flow of Useful Information Without Unfairly Burdening Free Speech

Petitioners insist that Arizona's matching funds program must be subjected, not to the First Amendment standard of review used by this Court in cases like *Citizens United*, *Turner* I and *Turner* II, where government sought to enhance the flow of useful information without imposing substantial burdens on any speaker, but by First Amendment strict scrutiny, the more stringent test used to review coercive speech-diminishing censorship. See *Buckley*, 424 U.S. at 23-59 (applying strict scrutiny to expenditure ceilings); and *Citizens United*, 130 S.Ct. at 896-97 (applying strict scrutiny to ban on corporate electioneering).

Petitioners make three unsuccessful arguments in favor of strict scrutiny. First, they assert an empirical claim that matching funds diminish or "chill" the speech of privately-funded candidates, who will allegedly forego campaign speech rather than trigger a matching fund reply. Second, petitioners argue that, because their speech triggers an opponent's rebuttal, they are forced to engage in

"compelled" speech. Finally, petitioners argue that publicly-funded rebuttal speech imposes a substantial "penalty" or "burden" on their speech warranting the imposition of strict scrutiny.

1. There is No Credible Evidence That the Prospect of Matching Funds Actually Deters Private Campaign Spending

Apart from unsupported assertions by several petitioners, nothing in the record or in the experience of the numerous jurisdictions that have adopted a matching fund program supports the empirical assertion that matching funds operate to diminish the speech of privately-funded candidates. If such a "chill" actually existed in the real world, one would expect a pattern of campaign spending by privately-funded candidates up to the matching fund threshold, with a distinct fall-off above the threshold. No such pattern has been demonstrated in Arizona or anywhere else.

In fact, the experience of jurisdictions that have adopted matching funds teaches exactly the opposite. Instead of inducing a strategic silence, the prospect of rebuttal speech, however funded, induces viable candidates to redouble their efforts to persuade the electorate, setting off reciprocally-reinforcing cycles of increased debate to the benefit of the voting public.[4]

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[4] It is, of course, possible that some matching fund program somewhere may be so unfairly structured that it actually deters privately-funded speakers. But the possibility of such a future "as applied" challenge cannot justify petitioners' facial attack

Moreover, even if petitioners could, counterfactually, demonstrate that some privately-funded candidates remain silent strategically in order to deny an opponent access to matching funds, such purely strategic behavior would not constitute a cognizable First Amendment "chill." The mere prospect of being verbally answered in a peaceful manner has never been thought to impose an unconstitutional chill on a speaker. *See Legal Services Corporation v. Velazquez*, 531 U.S. 533 (2001) (government obliged to fund full range of rebuttal courtroom speech by federally-funded Legal Services lawyers).

To the contrary, this Court's "chilling effect" cases require a showing of reasonable fear of tangible harm flowing from a credible threat of arrest, incarceration, or other significant sanction like private violence or the prospect of loss of employment. E.g., *Dombrowski v. Pfister* 380 U.S. 479 (1965); *Brown v. Socialist Workers Party '74 Campaign Committee*, 459 U.S. 87 (1982). *Doe v. Reed*, ___ U.S. ___, 130 S. Ct. 2811(2010). Fear of being peacefully responded to in an election campaign hardly rises to such a tangible harm.

2. Matching Funds Do Not "Compel" Unwanted Speech

Alternatively, petitioners seek to analogize the provision of matching funds to the compelled speech

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on the very concept of matching funds. *See Doe v. Reed*, ___ U.S. ___, 130 S. Ct. 2811 (2010); *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442 (2008).

regulations invalidated in *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943), *Wooley v. Maynard*, 430 U.S. 705 (1977), and *Pacific Gas & Electric Co. v. Public Utilities Comm'n*, 475 U.S. 1 (1986). But, unlike genuine compelled speech cases like *Barnette* and *Wooley v. Maynard*, Arizona's matching fund program in no way intrudes on petitioners' dignitary right to say only what they believe. Petitioners are not coerced by Arizona into personally affirming a belief they do not hold. See *Board of Regents of the University of Wisconsin v. Southworth*, 529 U.S. 217 (2000) (upholding student activities fee). Nor, as in cases like *Pacific Gas & Electric*, are petitioners forced to use their property to disseminate speech with which they disagree. While petitioners' privately-funded campaign spending may trigger the payment of matching funds, the matching funds do not come from petitioners' pocket. Petitioners remain free to devote 100% of their resources to the advancement of their beliefs, and are not compelled to devote a dime of their money or an iota of their time or property to the speech of anyone else.

In fact, the so-called "burden" on petitioners' speech and property caused by the prospect of rebuttal is far less onerous than the genuine intrusions on First Amendment interests deemed inconsequential in *Pruneyard Shopping Center v. Robins*, 447 U.S. 74 (1980), *Turner Broadcasting System, Inc., v. FCC*, 512 U.S. 622 (1994) (*Turner I*), and *Turner Broadcasting System, Inc., v. FCC*, 520 U.S. 180 (1997) (*Turner II*).

In *Pruneyard*, this Court ruled that California's recognition of a state-created right of physical access by speakers to the parking lot of a large shopping center did not abridge the First Amendment rights of the property owner. And, in *Turner* I and *Turner* II, this Court upheld the FCC's "must carry" rules requiring cable broadcasters to transmit the signals of over-the-air broadcasters.

Unlike *Pruneyard*, *Turner* I, and *Turner* II, the prospect of being answered involves no commandeering, physical taking, or diversion of petitioners' property to the advancement of another's ideas. Moreover, as in *Pruneyard*, *Turner* I, and *Turner* II, Arizona is seeking to "facilitate and enlarge public discussion and participation" (424 U.S. at 92-93). Finally, as in *Pruneyard*, *Turner* I, and *Turner* II, no possibility exists that petitioners will be erroneously deemed to support an opponent's ideas. There is, therefore, no basis whatever to treat the Arizona program as "compelling" anyone to speak.

3. Matching Funds Do Not Impose a Substantial Penalty or Burden on Petitioners' Speech

Finally, petitioners insist that Arizona's matching fund program should be subject to strict scrutiny because the provision of matching funds operates to "penalize" privately-funded speech. Petitioners ignore, however, that the sole "penalty" they experience is the prospect of voters hearing a response to their speech. While no one enjoys being

rebutted,[5] this Court noted as recently as *Citizens United* that providing voters with more speech is at the heart of the First Amendment. The incidental "burden" imposed on petitioners' speech by subjecting it to fair rebuttal is simply not a cognizable First Amendment injury.

Indeed, the so-called "penalty" of rebuttal is far less burdensome than genuine intrusions into First Amendment interests that have been upheld by this Court in the interest of increasing the flow of useful information in cases like *Buckley* (424 U.S. at 60-84) (loss of anonymity); *Citizens United* (130 S.Ct. at 913-16) (loss of anonymity); *Turner I* and *Turner* (512 U.S. at 653-57, and 520 U.S. at 214-16) (loss of broadcast autonomy); *Meese v. Keene*, 481 U.S. 465 (1987) (imposition of denigrating label), and *Christian Legal Society v. Martinez*, 561 U.S. ___, 130 S.Ct. 2971 (2010)(loss of associational autonomy).

In *Meese v. Keene*, *supra*, this Court upheld the constitutionality of a federal statute labeling as "political propaganda" moving pictures made with the financial support of a foreign government. The Court acknowledged that the negative connotation of the term vested the movie's distributor with First

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[5] The actual impact of rebuttal speech is, of course, impossible to predict. This Court has repeatedly recognized that the operation of a free market in ideas may reinforce, as well as undermine, the truth of the initial assertion. *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes and Brandeis, JJ., dissenting); *Whitney v. California*, 274 U.S. 357, 372 (1927) (Brandeis and Holmes, JJ., concurring).

Amendment standing,[6] but ruled on the merits that the absence of any coercive restrictions on dissemination, coupled with the value of providing the public with useful information, rendered the relatively minor[7] First Amendment "burden" constitutional.

Turner I *and Turner* II, *supra*, presented a First Amendment challenge to the FCC's "must carry" regulations compelling unwilling cable broadcasters to transmit the signals of over-the-air broadcasters. Justice Kennedy, writing for the Court, reasoned that the burden on cable broadcasters' First Amendment rights was relatively slight since the transmissions would usually involve otherwise unused space on the cable network. On the other hand, reasoned Justice Kennedy, the government's interest in assuring viewers continued access to the signals of over-the-air broadcasters was substantial. Accordingly, the Court declined to invoke First Amendment strict scrutiny, and ultimately upheld the "must carry" regulations as a reasonable effort to advance an important governmental interest in providing more speech.

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[6] The precise movie at issue in *Meese v. Keene* was a documentary on acid rain that had been partially subsidized by the Canadian government and had won an Academy Award in 1983. 481 U.S. at 468, n.3.

[7] Justice Stevens, writing for the Court in *Meese*, claimed that the First Amendment burden was minimal because the term "propaganda" may carry a positive connotation of persuasive, well-delivered speech. 481 U.S. at 477-78. The dissenters challenged Justice Stevens' understanding that "political propaganda" carries a positive connotation. 481 U.S. at 486-88.

In *Citizens United*, Justice Kennedy, once again writing for the Court, upheld the facial constitutionality of broad campaign disclosure laws, reasoning that the "burden" on campaign speakers through loss of anonymity was relatively slight, while the benefits to voters of receiving additional useful information was substantial. *Citizens United*, 130 S.Ct. at 913-16.

Most recently, in *Christian Legal Society v. Martinez*, 561 U.S. ___, 130 S.Ct. 2971 (2010), the Court considered a First Amendment challenge to a state university rule requiring that membership in a student organization receiving university recognition and support be open to all students. When the Christian Legal Society (CLS), a student organization at U.C. Hasting Law School, balked at admitting members who declined to pledge support for policies concerning homosexuality and pre-marital sex, Hastings withdrew its recognition of the organization, thereby ending its subsidized status.

This Court upheld the constitutionality of the "all comers" requirement for university recognition despite its adverse impact on associational freedom, reasoning that while the First Amendment "burden" on CLS was relatively slight (since an unrecognized organization was not forbidden from meeting or sponsoring events on campus), the university's educational interest in providing students with unconstrained access to all recognized student organizations was substantial. See 130 S.Ct. at 2998-3000 (Kennedy, J., concurring).

In this case, since the cognizable First Amendment "burden" imposed by matching funds is slight to nonexistent, and since Arizona's interest in combating corruption and enhancing speech and electoral participation is, at a minimum, substantial, the so-called "penalty" of being subjected to fair rebuttal does not trigger First Amendment strict scrutiny. Rather, Arizona's matching fund program must be measured by the standard of review applied by this Court to non-coercive, speech-enhancing regulations such as the public funding and disclosure provisions upheld in *Buckley*, the "must carry" rule in *Turner*, and the "all comers" regulation in *Christian Legal Society*.

4. Arizona's Matching Fund Program Clearly Satisfies the Applicable Level of First Amendment Scrutiny

In determining the facial validity of non-coercive, speech enhancing programs such as Arizona's matching fund plan, the Court applies a level of First Amendment scrutiny requiring Arizona to demonstrate: (1) the advancement of an important governmental interest; (2) a motive unrelated to the suppression of free expression; (3) facially non-discriminatory administration of the program; and (4) a plausible nexus between the matching fund program and the advancement of the government's interests. Compare *Citizens United*, 130 S.Ct. at 896-99 (reviewing ban on corporate electioneering), with *Citizens United*, 130 S.Ct. at 913-16 (reviewing campaign disclosure obligations). See also *Buckley*, 424 U.S. at 60-84; 97-99 (1976) (reviewing campaign

disclosure requirements and public funding of election campaigns).

Arizona's matching funds program clearly satisfies the applicable level of First Amendment scrutiny. First, the program, by encouraging broad candidate participation in public campaign funding, advances four important governmental interests characterized as "vital" or "compelling" by this Court in *Buckley*: (1) the prophylactic elimination of the appearance or reality of *quid pro quo* corruption from the electoral process (424 U.S. at 96);[8] (2) the "vital" interest in freeing candidates and elected officials from the time-consuming "gyre" of raising private funds, thereby enabling them to concentrate on public business (*Id* at 96); and (3) and (4) the desire to "facilitate and enlarge public *discussion* and *participation* in the electoral process" (*Id* at 92-93) (emphasis added). Any one of the four *Buckley* interests would be sufficient to satisfy First Amendment scrutiny. Taken together, the four interests provide an overwhelming justification for Arizona's effort to encourage candidate participation in its public funding program without imposing coercive restrictions or other substantial burdens on privately-funded candidates.

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[8] In simultaneously upholding contribution ceilings, disclosure rules, and public funding, the *Buckley* Court implicitly rejected petitioners' argument that once contribution limits and disclosure rules are in place, public funding is no longer justified to fight corruption. As the *Buckley* Court realized, even with contribution ceilings and disclosure rules in place, public funding provides a level of prophylaxis and public reassurance concerning the risk of corruption that no combination of prohibitions and disclosure rules can match.

Second, the Arizona program is clearly not aimed at the suppression of ideas. To the contrary, it is open to all, and is designed to facilitate the broadest possible exchange of campaign speech.

Third, the concept of matching funds is facially non-discriminatory. Petitioners' effort to label the very idea of matching funds as a content-driven discrimination against privately-funded candidates is wholly unpersuasive. There is no substantive, content-based connotation to the purely descriptive labels "privately" or "publicly" funded. Candidates of every political stripe enjoy complete freedom to adopt either label and will fall into one or the other category of their own volition without regard to their political beliefs. Any public funding program will inevitably treat publicly and privately funded candidates differently – but that is not content-based discrimination. Rather, it is simply the consequence of this Court's ruling in *Buckley* that public funding programs must be voluntary, thereby creating the prospect of two categories of candidate subject to differing legal regimes.[9]

Petitioners' claim of a "multiplier effect" reveals the fallacy at the core of their content-based discrimination argument. Petitioners argue that when multiple candidates run against each other, as in a party primary, if most of the candidates have elected to participate in public funding, a single,

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[9] It is possible that a poorly-designed matching fund system could so disadvantage privately-funded candidates as to discriminate against them. But such an as applied challenge cannot support a facial challenge to the very idea of matching funds.

privately funded candidate will trigger multiple payments to the publicly-funded candidates, thereby creating an alleged discrimination between publicly and privately funded candidates. But petitioners ignore the fact that the existence of public and private funding does not create rival blocs of candidates running against each other as if they were members of competing political parties. Rather, multiple candidates, however funded, run against each other in a Hobbesean "war of all against all." The matching funds available to multiple publicly funded candidates will be expended as much in opposition to other publicly funded candidates as they will be against the privately-funded candidate. What petitioners call discrimination is, therefore, merely the prevention of a campaign spending mismatch in a race with multiple candidates.[10]

Finally, Arizona may plausibly prefer the efficiency of a matching fund system to more expensive, less efficient, and less effective methods of encouraging candidate participation, like raising the public subsidy for all participating candidates even when the expenditure of additional scarce resources is unnecessary in a particular election; or

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[10] Petitioners' as applied challenge to the allegedly asymmetrical treatment of independent expenditures, as well as the allegedly inadequate 6% deduction for private fundraising costs, should be addressed on remand once the threshold question of the constitutionality of matching funds has been resolved. Since the parties and the lower courts concentrated almost exclusively on the facial constitutionality of the concept of matching funds, neither the record, nor the lower court opinions provides an appropriate foundation for the consideration of such as applied issues.

permitting subsidized candidates to seek private contributions, thereby diluting the reason for public financing in the first place. In *Buckley*, this Court recognized that the Constitution does not require scarce public resources to be squandered on non-viable candidates. Neither does it requires states to squander scarce public resources in electoral settings where no public benefit would result.[11]

II

ARIZONA'S MATCHING FUND PROGRAM IS FULLY CONSISTENT WITH THIS COURT'S DECISION IN *DAVIS v. FEC*

In *Davis v. FEC*, 554 U.S. 724 (2008), this Court struck down the so-called "Millionaire's Amendment," under which a self-funded candidate who expended more than $350,000 in personal funds was forced to endure a discriminatory contribution ceiling three times lower than the ceiling governing his opponent. *Davis* involved the confluence of two classic lines of First Amendment authority – hostility to regulations treating similarly-situated speakers differently (*Minneapolis Star and Tribune Company v. Minnesota Comm'r of Revenue*, 460 U.S. 575 (1983)); and refusal to permit the government to coercively burden the speech of a powerful speaker

[11] Petitioners appear to concede that Arizona could provide far higher initial subsidies to all participating candidates, and then seek to recover unneeded funds in settings where the subsidy advanced no public purpose. It borders on the absurd, however, to require Arizona to elect a program that forces it to recoup unneeded costs, as opposed to paying out the funds only when needed.

in order to enhance a weaker voice (*Buckley*, 424 U.S. at 17; 48-49). Justice Alito, writing for the Court, ruled that a wealthy, self-funded candidate could not be subjected by law to harsher contribution limits than his or her opponent in an effort to enhance the opponent's speech.

Petitioners' argue that Justice Alito's observation in *Davis* that a wealthy, self-funded candidate would be unconstitutionally "penalized" for spending above the $350,000 trigger renders the Arizona plan similarly unconstitutional. They argue that privately-funded candidates in Arizona are equally "penalized" when they spend above the matching fund trigger. But, the "penalty" described by Justice Alito in *Davis* was the imposition of discriminatory fund-raising rules designed to coercively limit the speech of one candidate in order enhance the relative speech of the other candidate. No such constitutional flaw is present in the Arizona plan. Unlike *Davis*, Arizona places no coercive limits, relative or otherwise, on the freedom of a privately-funded candidate to raise and spend unlimited sums. The only "penalty" a privately-funded candidate experiences is the prospect that a wealth-related speech advantage will be diminished by a government-funded rebuttal. The prospect of being answered in a political campaign is, however, a far cry from the coercive imposition of differential contribution limits backed by criminal sanctions in *Davis*.

Nor is the provision of matching funds facially discriminatory. Unlike *Davis*, where the candidates were legally indistinguishable (except for personal

wealth), candidates in Arizona will have voluntarily elected different legal regimes governing campaign financing. Once candidates voluntarily opt for different legal regimes, they are inevitably subjected to different legal rules. Unlike *Davis*, where the mere existence of differential legal rules applied to similarly situated speakers triggered First Amendment strict scrutiny, the issue in this case is not whether differential legal rules apply to publicly and privately funded candidates – of course they do - but whether the rules actually violate the First Amendment rights of the privately-funded candidate.

Justice Alito answered that question in *Davis* when he noted that there would have been nothing unlawful in an alteration of the contribution limits governing both candidates designed to lessen the self-funded candidate's wealth-related speech advantage. There is, noted Justice Alito, no First Amendment right to the retention of a campaign speech advantage based solely on wealth. 554 U.S. at 737.

Thus, nothing in the holding of *Davis* suggests that Arizona's effort to render its system attractive to candidates by minimizing the likelihood of a public/private campaign speech imbalance, while leaving privately-funded candidates free to raise and spend unlimited sums, violates the First Amendment.

III

THE PROVISION OF MATCHING FUNDS IS A CONSTITUTIONALLY PERMISSIBLE MEANS OF REDUCING THE CORROSIVE EFFECT ON AMERICAN DEMOCRACY OF ELECTORAL ADVANTAGES PREMISED SOLELY ON WEALTH

A powerful metaphor rests at the heart of *Buckley*. In explaining why campaign spending should be treated as the equivalent of speech for the purposes of First Amendment analysis, the Court analogized money to the fuel in a car's gas tank, and a political campaign to the car. The Court asked rhetorically how far a car – or a candidate – could go without fuel. *Buckley*, 424 U.S. at 19, n.18. In one sense, however, the powerful metaphor is incomplete. A contested election is not a drive in the country. It is a long-distance race. And a race (or an election) where one party has most of the fuel is neither fair, designed to reward merit, nor particularly interesting to the spectators, especially when the suppliers of the needed fuel expect to be rewarded by the winner.

Not surprisingly, government officials have repeatedly urged this Court to recognize that American society, deeply committed to free speech, political equality and vibrant democracy, has a vital interest in minimizing the corrosive effect of wealth-based electoral advantages on both the fundamental fairness of the democratic process, and the confidence of ordinary Americans that their voices can be heard in the political marketplace. In cases

like *Buckley* and *Davis*, this Court recognized the cogency of the concern, but warned that the First Amendment forbids even well-intentioned efforts by government to strengthen weak voices by imposing coercive limits on strong ones. *Buckley*, 424 U.S. at 17; 48-49; *Davis*, 554 U.S. at 737. Instead, the Court noted that government may subsidize weak voices, rather than coercively censor strong ones. That is exactly what Arizona has done. For 35 years, this Court has invited government to deal with the corrosive impact of significant wealth disparity on American democracy by using subsidies to level the campaign playing field. Matching funds provide a cost-efficient, demonstrably successful means to do so, without imposing a coercive burden on a privately-funded candidate, other than the incidental "burden" of being rebutted. It would be a tragedy if this Court were to announce that the subsidy option is a blind alley down which cars and candidates without enough gas must disappear.

CONCLUSION

For the above-stated reasons, *amici* urge the Court to affirm the conclusion of the Court below that Arizona's matching fund program is facially constitutional, and to remand the case for further consideration of any as applied challenges to the actual operation of the Arizona program.

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